Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

STACEY MILLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

At Stacey Miller's federal drug trial, substitute trial counsel told the jury in her opening statement that she would present several alibi witnesses as part of an alibi and misidentification defense. Both the original trial counsel (who was mentally ill) and substitute trial counsel (who stated on the record that she did not adequately prepare to try the case), however, failed to timely provide notice of three alibi witnesses who would have testified that Miller was out of town on the day in question. Counsel's failure resulted in the trial court excluding the witnesses' alibi testimony.

On post-conviction review, the district court denied Miller's *pro se* petition, which was based upon, *inter alia*, ineffective assistance of counsel for failure to timely provide notice of alibi witnesses. Without oral argument, a divided panel of the Seventh Circuit issued an unpublished order in which the court summarily affirmed and adopted the district court's opinion. The dissenting judge objected to this summary treatment because, *inter alia*, the district court's opinion did not respond to arguments brought by appointed counsel in the Seventh Circuit. Among other things, appointed counsel argued that Miller should receive a new trial based on Sixth Circuit authority dictating a new trial on the same claim and similar facts. The dissenting judge, after discussing numerous problems with the summary treatment of Miller's appeal, clearly noted that he "would set this case for oral argument in due course."

This case thus presents the following important questions:

1. Whether the failure to hold oral argument by a divided panel of a federal court of appeals violates the unanimity requirement of Federal Rule of Appellate Procedure 34(a)(2) and procedural due process where the dissenting judge objects to the panel's summary treatment of an appeal and explicitly states a desire for oral argument.

2. Whether the Seventh Circuit erroneously denied relief on an ineffective assistance of counsel claim where *Clinkscale v. Carter*, 375 F.3d 430 (6th Cir. 2004), dictates a new trial on the same claim and similar facts, and 28 U.S.C. § 2255 mandates, at a minimum, an evidentiary hearing.

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Petitioner Stacey Miller respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The order of the court of appeals adopting and attaching the opinion and orders of the district court (App. 1a-18a) is unreported. The order of the court of appeals denying rehearing or rehearing en banc (*id.* at 32a) is unreported. The opinion and order of the district court denying post-conviction relief (*id.* at 19a-31a) are unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on June 1, 2006, and petitioner's timely petition for rehearing or rehearing en banc was denied August 8, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PROCEDURAL, CONSTITUTIONAL, AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Appellate Procedure 34(a)(2) provides:

> (2) **Standards.** Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:
>
> (A) the appeal is frivolous;
>
> (B) the dispositive issue or issues have been authoritatively decided; or
>
> (C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

Fed. R. App. P. 34(a)(2).

The Fifth Amendment to the United States Constitution provides that: "No person shall be . . . deprived of life,

liberty, or property, without due process of law . . . ." U.S. Const. am V.

28 U.S.C. § 2255 provides in relevant part that: "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon . . . ." 28 U.S.C. § 2255.

STATEMENT OF THE CASE

A. Pretrial Proceedings

On July 24, 2001, the district court appointed James Cooley to represent Stacey Miller against two charges of distributing five grams or more of cocaine base on May 10, 2001, in Madison, Wisconsin. Soon thereafter, Cooley hired an investigator to verify Miller's alibi that he was out of state on May 10, 2001. (R. 111.) On September 27, 2001, the government filed a Demand for Notice of Alibi pursuant to Federal Rule of Criminal Procedure 12.1. (R. 29.) On October 8, 2001, Cooley filed a Notice of Alibi that Miller was in Chicago, Illinois, on May 10, 2001, at the time of the alleged transactions. (R. 40.) The Notice of Alibi stated that on May 10, 2001, between approximately 3:00 p.m. and 5:00 p.m., Miller met with Carleton Higgins "at Mr. Miller's mother's house." (*Id.*) On November 5, 2001, Cooley amended the Notice of Alibi to include Robert Morgan as an additional alibi witness. (R. 46.) Cooley also filed a sealed ex parte motion for subpoenas that included, *inter alia*, alibi witnesses Higgins, Morgan, Jacqueline Pollard (Miller's mother), and Princess Jordan (Miller's girlfriend). (R. 47 at 1-2.) The motion stated that "Pollard and Jordan will testify that, while not actually with the defendant at the specific time of the alleged sale in Madison, they both had seen him in Chicago on May 10, 2001, as well as throughout the week of May 7, 2001." (*Id.* at 2.) On November 7, 2001, Magistrate Judge Crocker granted the motion. (R. 56.)

On November 19, 2001, before jury selection on the first trial date, Cooley informed Judge Crabb that he was too ill to proceed. (R. 73.) Judge Crabb moved the trial to December 10, 2001. (*Id.*) On December 3, 2001, Cooley filed a motion to move the trial date a second time due to his continued

mental illness and indicated that "[i]n the unlikely event that counsel is still to[o] ill to proceed . . . Attorney Ralston would take over the case." (R. 82.) On December 4, 2001, Judge Crabb entered an order noting her conditional willingness to move the trial "to allow either present counsel or backup counsel, Krista Ralston, to try the case." (R. 83.) On December 7, 2001, Cooley wrote Judge Crabb agreeing to the January 28, 2002, trial date (R. 84) and Judge Crabb entered an order continuing the trial (R. 85). On December 17, 2001, Judge Crabb issued another order addressing the continuance of trial. (R. 87.) This order discussed the reasons for the second continuance, including the need for Ralston to prepare to try the case. (*Id.*) On Saturday, January 26, 2002, two days before the new trial date, Cooley was found unconscious in his car and hospitalized, resulting in Ralston taking over as trial counsel. (R. 116 at 5:18-6:18.)

B. Miller's Trial And The Exclusion Of Alibi Witnesses

On January 28, 2002, Miller's jury trial began in front of Judge Crabb. Before opening statements, Ralston noted on the record that she did not feel "adequately prepared to proceed" (*id.* at 3:18-21) despite the previous court orders, because she "didn't get as involved in preparing this case as [she] would have if [she] had thought [Cooley] was not well" (*id.* at 4:13-17). In response, Judge Crabb indicated that she thought Ralston would be preparing for trial given Cooley's illness and the uncertainty surrounding whether he would be able to try this case: "it was my understanding that there would be somebody working with Mr. Cooley at all times; because no one, particularly me, could be sure that Mr. Cooley would be ready to go to trial on the day it was scheduled." (*Id.* at 8:12-18.) Judge Crabb also noted problems with continuing the trial again, concluding "it's a problem that I think Mr. Cooley was supposed to be responsible for, and he was supposed to have somebody ready to go, completely ready to go if he couldn't, if he couldn't be ready." (*Id.* at 8:19-9:4.)

Following the discussion of Ralston's substitution as Miller's trial counsel, Miller's trial began with Ralston's opening statement which described an alibi and

misidentification defense to the jury. (R. 121 at 69:16-74:9.) As the cornerstone of this defense, Ralston told the jury that "[o]n the 10th of May, Mr. Miller was in Chicago." (*Id.* at 72:20.) Ralston noted that Miller had a pass from his parole agent to travel to Chicago. (*Id.* at 72:20-24.) Moreover, "[w]e will have *several* people testify that they saw him in Chicago and when they saw him and what he was doing there." (*Id.* at 72:24-25) (emphasis added.)

Following testimony that morning, the government expressed concern to the district court that Ralston represented in her opening statement that she would present "several" people to testify that Miller was in Chicago. The government noted that if "several" meant more than the two alibi witnesses Cooley properly disclosed, the undisclosed witnesses should be excluded. (R. 116 at 38:7-24.) Ralston responded that it was her "understanding that Mr. Cooley did turn over two other names. That is, Princess Jordan and Jackie Pollard." (*Id.* at 39:2-4.)

The government then argued for the exclusion of the witnesses' alibi testimony due to Cooley's failure to comply with Rule 12.1. (R. 113 at 4:16-5:7.) In the course of this argument, the government stated on the record that Ralston produced interview notes indicating Jordan and Pollard had alibi testimony to give:

> Now last night Ms. Ralston did fax to me witness notes I guess from the interviews conducted by investigators . . . it does appear Princess Jordan and [Jacqueline] Pollard may have had something to say to him about seeing Mr. Miller on or about this date of May 10th.

(*Id.*) Nevertheless, the district court excluded alibi testimony from anyone other than the two properly noticed alibi witnesses because, "Mr. Cooley had an obligation to advise [the government] quite awhile ago . . . ." (*Id.* at 5:16-19.) After the district court excluded the alibi witnesses, Ralston noted for the record that Jordan and Pollard had appeared at court to testify. (*Id.* at 5:25-6:6.)

The government presented seven witnesses at trial. (R. 144 at 6.) However, "[t]he main thrust of the government's

case" was the testimony of Bernard Gonzalez, the undercover police officer to whom Miller allegedly sold cocaine base, and Mark Winfield, Miller's former co-defendant. (*Id.*; R. 118 at 43:13-18.) The foundation of Gonzalez's testimony was his identification of Miller as the person who sold him cocaine base on May 10, 2001. Gonzalez initially made this identification at police offices from a photograph array that contained eleven photographs, all of which were of Miller. (R. 39 at 25:22-26:11, 31:4-14.) Gonzalez positively identified one photograph in this array as Miller. (*Id.*) Gonzalez shredded the notes upon which he made his May 10, 2001, police reports based upon a "personal" policy. (R. 113 at 29:11-30:20.)

The prosecution also elicited the testimony of Winfield, who received substantial benefits from the government for his testimony, including the right to plead guilty to only one of the six counts against him in exchange for his testimony against Miller. (*Id.* at 71:22-72:13.) Winfield reviewed the police reports describing Gonzalez's version of the events prior to testifying at trial. (*Id.* at 73:18-74:23.) At trial, Winfield described his history with Miller and their alleged drug connection. (*Id.* at 56:9-59:20.) As to the events of May 10, 2001, Winfield stated that he was at a barbershop the two times that Gonzalez called Winfield to buy cocaine base. (*Id.* at 61:8-62:21.) Winfield further testified that he called Miller both times and Miller sold Gonzalez cocaine base. (*Id.* at 61:22-62:6, 63:4-8.) Winfield also testified that after they were indicted, Miller told him to say that Miller was not there. (*Id.* at 68:18-25.) Finally, Winfield testified that Miller was going to call two witnesses to testify that he was in Chicago: "Bobby Morgan and Carlton." (*Id.* at 69:14-70:3.)

Due to the exclusion of Pollard and Jordan as alibi witnesses, and Higgins never arriving at the trial due to car trouble on his trip from Chicago to Madison (R. 118 at 53:1-9, ~~109:~~10-112:9), Ralston presented three witnesses in defense of Miller, with one, Morgan, providing alibi testimony. At one point during the trial, Sheneka Ware (Miller's sister) began to testify that she had personal knowledge of Miller going out of town on or around May 6

or 7, but the government objected based upon the court's previous Rule 12.1 ruling and the district court sustained the objection. (R. 118 at 72:17-23.)

Miller's lone alibi witness at trial, Morgan, lived three houses down from Miller's mother's (Pollard's) house. (R. 118 at 90:14-91:21.) Morgan testified that, while taking his daughter to and from school in Chicago on May 10, 2001, he saw Miller on Miller's mother's porch at approximately 11:00 a.m. and 2:20 p.m. (*Id.* at 92:3-93:5; 95:17-20.) On cross examination, Morgan denied telling a police detective that he only saw Miller around 10:00 a.m. on May 10, 2001. (*Id.* at 99:19-101:6.) Morgan also said he would not tell the jury if Miller had asked him to lie. (*Id.* at 108:25-109:3.) The government highlighted the fact that Ralston only presented Morgan as an alibi witness during closing argument: "doesn't it strike you perhaps as incredibly convenient that the one witness, Mr. Morgan, from the 4th to the 12th[,] he sees [Miller] or remembers seeing him on May 10, when he tells you that at 2:20 or so in the afternoon." (R. 123 at 52:2-6.)

On January 29, 2002, the jury found Miller guilty on both charged counts. On April 12, 2002, Judge Crabb sentenced Miller to 400 months on each count, with the sentences to run concurrently. On April 26, 2002, Miller filed a timely notice of appeal in which he claimed that the district court abused its discretion when it failed to grant a third continuance so Ralston could properly prepare to try the case. Miller also raised an ineffective assistance of counsel claim, but, as the Seventh Circuit noted, "chose wisely, at oral argument, to reserve that claim for a § 2255 petition." *United States v. Miller*, 327 F.3d 598, 601 (7th Cir. 2003). On May 1, 2003, the Seventh Circuit affirmed Miller's conviction.

C. Post-Conviction Proceedings

On July 28, 2004, Miller filed a timely *pro se* petition pursuant to 28 U.S.C. § 2255 (R. 136), for which the district court had jurisdiction pursuant to 28 U.S.C. § 1331, *see* 28 U.S.C. § 1331 (subject matter jurisdiction). On August 3, 2004, Miller amended his petition. (R. 137; R. 138.) In the

amended papers, Miller brought claims for, *inter alia*, ineffective assistance of counsel. (R. 137 at 4, 27-32; R. 138 at 18-22, 23-24.) On or about November 25, 2004, Miller submitted his traverse to the government's response, arguing, *inter alia*, ineffective assistance of counsel. (R. 147 at 37-38, 45-47, 57-65.) On or about December 7, 2004, Miller submitted affidavits from Cooley, Ralston, Pollard, and Ware. (R. 148; R. 150; R. 151; R. 152.) In these affidavits, Miller's trial counsel admitted that they provided ineffective assistance of counsel, Cooley asserts that he found Miller's alibi defense credible, and alibi witnesses Pollard and Ware elaborated upon the substance of their proposed alibi testimony. (*Id.*)

On December 29, 2004, the district court denied Miller's petition in its entirety, holding that Miller "has not made the necessary showing" on his pertinent ineffective assistance of counsel claims. (App. 28a.) Relatedly, the district court denied the affidavits as untimely, and stated that the affidavits would not have changed the outcome. (*Id.* at 29a.) On March 8, 2005, Judge Crabb issued a certificate of appealability as to Miller's ineffective assistance of counsel claims because she could not "say that a reasonable judge would not make a different decision" as to Miller's entitlement to relief on these claims. (*Id.* at 16a.)

On June 2, 2005, the Seventh Circuit appointed present counsel to represent Miller in his post-conviction appeal pursuant to the provisions of the Criminal Justice Act. On October 31, 2005, counsel filed a brief advocating that the allegations and evidence of trial counsel's ineffective assistance of counsel for failure to timely provide notice of three alibi witnesses and reasonably present an alibi defense entitled Miller to relief. On January 3, 2006, the government filed its response brief. On January 13, 2006, Miller filed his reply brief.

Without oral argument, on June 1, 2006, a divided panel of the Seventh Circuit issued an unpublished order in which the court summarily affirmed and adopted as its own the district court's December 29, 2004, opinion and order, and the March 8, 2005, orders. (App. 1a-18a.) The dissenting judge

objected to the summary treatment of Miller's appeal, noting, *inter alia*, that:

> In the case before us, the appeal cannot be considered facially frivolous. Indeed, both parties have submitted extensive and thoughtful briefs. Nor can the discussion of the issue on appeal by the district court be said to be totally responsive to the presentation of the appellant in this court. Finally, our order in this case, adopting the order of the district court, does not fulfill our obligation to provide the Supreme Court with an adequate explanation of our decision.

(*Id.* at 18a.) The dissenting judge concluded by stating that he "would set this case for oral argument in due course." (*Id.*) On August 8, 2006, the Seventh Circuit denied Miller's timely petition for rehearing or rehearing en banc. (*Id.* at 32a.)

REASONS FOR GRANTING THE PETITION

An exercise of this Court's supervisory is warranted because the arbitrary denial of oral argument in violation of Rule 34(a)(2) constitutes a deprivation of due process, ignores the policy choice by Congress and the Federal Judiciary favoring correct results over additional judicial economy, and is recognized by judges and academics as a significant problem existing across the courts of appeals. Moreover, the divided panel of the Seventh Circuit's erroneous denial of any form of relief on Miller's ineffective assistance of counsel claim conflicts with both Sixth Circuit authority that dictates a new trial on the same claim and similar facts, and the standard for an evidentiary hearing mandated by 28 U.S.C. § 2255.

I. VIOLATION OF RULE 34(a)(2) CONSTITUTES A DEPRIVATION OF DUE PROCESS, IGNORES THE POLICY CHOICE MADE BY CONGRESS AND THE FEDERAL JUDICIARY, AND IS A SIGNIFICANT PROBLEM ACROSS THE CIRCUITS

A. The Seventh Circuit Denied Oral Argument In Violation Of Rule 34(a)(2)

Federal Rule of Appellate Procedure 34(a)(2) dictates that, "[o]ral argument *must* be allowed in every case unless a panel of three judges who have examined the briefs and record *unanimously* agrees that oral argument is unnecessary . . . ."[1] Fed. R. App. P. 34(a)(2) (emphasis added). In this case, a divided panel of the Seventh Circuit issued an order summarily affirming and adopting the district court's opinion without holding oral argument despite the dissenting judge clearly stating that he "would set this case for oral argument in due course." (App. 18a.) Under the plain language of Rule 34(a)(2), since the panel did not unanimously agree that oral argument was unnecessary, the panel was required to hold oral argument in order to fully consider the merits of Miller's appeal. The Seventh Circuit's departure from the plain language of Rule 34(a)(2) warrants an exercise of this Court's supervisory power due to the importance of this violation of the Federal Rules of Appellate Procedure.

B. The Seventh Circuit's Violation Of Rule 34(a)(2) Deprived Miller Of Procedural Due Process

"For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard . . . .'" *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Baldwin v. Hale*, 68 U.S. 223, 233 (1863)). "It is equally fundamental that the right to . . . an opportunity to be heard 'must be granted at a

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[1] Federal Rule of Appellate Procedure 34(a)(2) applies to "all proceedings in the courts of appeals," including those brought pursuant to 28 U.S.C. § 2255. *See* Fed. R. App. P. 1 advisory committee notes.

meaningful time and in a meaningful manner.'" *Fuentes* at 80 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). "The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his [liberty or property]." *Fuentes* at 80.

"[T]he right of oral argument as a matter of procedural due process varies from case to case in accordance with differing circumstances . . . ." *FCC v. WJR*, 337 U.S. 265, 276 (1949) (citations omitted). This right is to be determined after consideration of "the particular interests affected, circumstances involved, and procedures prescribed by Congress for dealing with them. Only thus may the judgment of Congress, expressed pursuant to its power under the Constitution to devise . . . judicial . . . procedures, be taken into account." *Id.* at 277.

Because Congress prescribed a right to oral argument on appeal in defined circumstances, the arbitrary denial of that right violates due process, as "the touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); *accord Slochower v. Bd. of Higher Educ.*, 350 U.S. 551, 559 (1956); *see also Evitts v. Lucey*, 469 U.S. 387, 400-01 (1985) (while the Constitution does not mandate that a state provide a system of appellate review, once it does, "[t]he right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms").

Congress and the federal judiciary recognized and prescribed in Rule 34(a)(2) a right to oral argument "in every case" on appeal in the federal judicial system unless a panel of three judges "unanimously" agrees that oral argument is unnecessary.[2] *See* Fed. R. App. P. 34(a)(2); *see generally Nelson v. Adams USA, Inc.*, 529 U.S. 460, 465 (2000) ("The

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[2] "Congress has authorized the federal judiciary to prescribe the rules of . . . procedure . . . subject to an expressly reserved legislative power to reject, modify, or defer any judicially-made rules." Judicial Conference of the United States, Subcomm. On Long Range Planning, *A Self-Study of Federal Judicial Rulemaking*, 168 F.R.D. 679, 687 (1995).

Federal Rules of Civil Procedure are designed to further the due process of law that the Constitution guarantees."). The Seventh Circuit's denial of oral argument in contravention of the express terms of Rule 34(a)(2)'s unanimity requirement therefore arbitrarily denied Miller a fundamental procedural safeguard recognized by Congress and the federal judiciary, a clear violation of procedural due process. *See generally Bd. of Regents v. Roth*, 408 U.S. 564, 591-92 (1972) (Marshall, J., dissenting) ("'Experience teaches . . . that the affording of procedural safeguards, which by their nature serve to illuminate the underlying facts, in itself often operates to prevent erroneous decisions on the merits from occurring.'" (citation omitted).

C. Rule 34(a)(2) Reflects A Policy Choice By Congress And The Federal Judiciary Favoring Assurance Of Correct Results Over Additional Judicial Economy

The 1979 amendment to Rule 34 added important safeguards against courts of appeals improperly dispensing with oral argument - the unanimity requirement and the corresponding minimum standard for judges to apply before dispensing with oral argument. *See* Fed R. App. P. 34(a) (effective August 1, 1979). The amendment was "patterned after the recommendations" in the Report of the Commission on Revision of the Federal Court Appellate System (hereinafter "Hruska Commission Report" or "Hruska Commission"). *Id.* at advisory committee notes; *see generally* Report of the Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 255 (1975) (recommendations regarding oral argument).

Congress created the Hruska Commission "[i]n recognition of the problems faced by the federal courts of appeals." Hruska Commission Report, 67 F.R.D. at 207. Congress assigned the Hruska Commission to, *inter alia*, "'report . . . its recommendations for such additional changes in structure or internal procedure as may be appropriate for the expeditious and effective disposition of the caseload of

the Federal courts of appeal, consistent with fundamental concepts of fairness and due process.'" *Id.* at 208.

Regarding oral argument, the Hruska Commission "recognize[d] the importance of safeguarding the right to oral argument in all cases where it is appropriate." *Id.* at 254. As the Hruska Commission explained, "[o]ral argument is an essential part of the appellate process. It contributes to judicial accountability, it guards against undue reliance upon staff work, and it promotes understanding in ways that cannot be matched by written communication." *Id.* at 254-55.

The Hruska Commission noted that in order to safeguard the right to oral argument in appropriate cases, "[s]tandards for the grant or denial of oral argument . . . [should be] dealt with through the rule-making process." *Id.* at 255. Underlying this recommendation was a concern regarding "[t]he extent to which the opportunity to present oral argument is denied litigants in a number of the circuits." *Id.* Importantly, the Hruska Commission recognized that, "[t]o mandate oral argument in every case would clearly be unwarranted; neither is it appropriate to ignore the risks to the process of appellate adjudication inherent in too-ready a denial of the opportunity orally to present a litigant's cause." *Id.*

The policy choice in favor of oral argument in appropriate cases made by the Hruska Commission and implemented in the 1979 amendment to Rule 34 continues to garner support. For example, a report of the Federal Judicial Center in a study of case screening and the reduction in oral arguments in four federal courts of appeals (hereinafter "Federal Judicial Center Report") notes that:

> [t]he critical feature of a nonargument process is the means by which a single judge can reject a case from the nonargument calendar and have it placed before a panel of judges for oral argument. It is the rejection process that ensures that each case receives the attention thought appropriate by the most cautious judge on the panel.

Joe S. Cecil & Donna Stienstra, Fed. Judicial Ctr., *Deciding Cases Without Argument: An Examination of Four Courts of*

Appeals, 161 (1987). Moreover, the importance of the proper utilization of oral argument is recognized by judges and academics alike. *See, e.g.*, Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 Iowa L. Rev. 35, 38 (1986) ("The argument gives the court, with all the panel members participating, an opportunity to test ideas and to discuss problems about the case with counsel. The free interchange of ideas pursued at oral argument increases the court's ability to reach the right and just result."); William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 Cornell L. Rev. 273, 280 (1996) ("The marked decrease in argument, therefore, necessarily reduces the quality of decision making.").

D. Violation Of Rule 34(a)(2) Is Recognized By Judges And Academics As A Significant Problem Existing Across The Courts Of Appeals

Despite the plain language of Rule 34(a)(2) protecting the right to oral argument in federal appeals, courts of appeals continue to deny oral argument in contravention of the rule. This is clear in a number of appeals, similar to Miller's, where the panel denied oral argument despite the dissenting judge explicitly stating a desire for oral argument. *See, e.g.*, *Gravatt v. Paul Revere Life Ins. Co.*, No. 02-17028, 2004 WL 1257716, at *6 (9th Cir. 2004) (Wallace, J., dissenting) ("In our rush to limit our time on the bench, a party may have suffered a reversal when twenty minutes of oral argument could have satisfied a majority that this outcome is unwarranted"); *United States v. Lambert*, 963 F.2d 711, 719 (5th Cir. 1992) (Wisdom, J., concurring and dissenting) ("This case deserved oral argument before our panel . . . ."); *Bowers v. DeVito*, 686 F.2d 616, 619 (7th Cir. 1982) (Wood, J., dissenting) ("I respectfully dissent because I am concerned about this case sliding by us under Fed. R. App. P. 34 dispensing with oral argument after it was disposed of on motions in the district court.").

Moreover, a number of judges and academics have publicly recognized the erosion of Rule 34(a)(2), whether it be due to increasing caseloads, collegial norms, or a devaluation of oral argument. For example, one academic

wrote that "[t]he promise in Federal Rule of Appellate Procedure 34 . . . has been rendered rather Orwellian by the circuit judges' collective response to the caseload crisis . . . to what amounts to a de facto presumption that most appeals can be decided without oral argument." Thomas E. Baker, *Intramural Reforms: How the U.S. Courts of Appeals Have Helped Themselves*, 22 Fla. St. U. L. Rev. 913, 923 (1995). The Federal Judicial Center Report contained a second possible cause for the erosion of Rule 34(a)(2): "[s]everal [courts of appeals] judges expressed concern that awareness of the preferences of other panel members for nonargument in a case may cause their colleagues to become reluctant to state a preference for argument." Cecil, *supra*, at 161-62. As a final example, Sixth Circuit Judge Merritt wrote: "[people] can speculate on their own about how well each court of appeals is doing in complying with the presumption favoring oral argument found in Rule 34 . . . and whether the performance of each is consistent with the appropriate standards of visibility, accountability and care. My own view is that many circuits have unwisely devalued oral argument and left themselves open to valid criticism." Gilbert S. Merritt, *The Decision Making Process in Federal Courts of Appeals*, 51 Ohio St. L. J. 1385, 1388 (1990).

While the magnitude the of erosion of Rule 34(a)(2) has yet to be quantified, the rate of oral argument in the courts of appeals continues to fall.[3] This decline is especially troublesome given that underlying the Hruska Commission's oral argument recommendation was a concern regarding "[t]he extent to which the opportunity to present oral argument is denied litigants in a number of the circuits." Hruska Commission Report, 67 F.R.D. at 255.

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[3] *See*, e.g., Judicial Facts and Figures, Table 2.2, http://www.uscourts.gov/judicialfactsfigures/Table202.pdf. (excluding the Federal Circuit, the percentage of cases in the courts of appeals terminated on the merits after oral hearing (versus after submission on briefs) has declined from 45% in 1990 to 30% in 2005).

II. THE SEVENTH CIRCUIT ERRONEOUSLY DENIED MILLER ANY FORM OF RELIEF IN CONFLICT WITH SIXTH CIRCUIT AUTHORITY THAT DICTATES A NEW TRIAL AND 28 U.S.C. § 2255, WHICH MANDATES, AT A MINIMUM, AN EVIDENTIARY HEARING

A. The Divided Panel Of The Seventh Circuit's Decision Conflicts With Sixth Circuit Authority That Dictates A New Trial On The Same Claim And Similar Facts

As the dissenting member of the divided panel of the Seventh Circuit noted, in "truncat[ing] the usual appellate procedures" in violation of Rule 34(a)(2), the divided panel summarily affirmed and adopted the opinion of the district court notwithstanding the fact that "the discussion of the issue on appeal by the district court [cannot] be said to be totally responsive to the presentation of [Miller] in [the Seventh Circuit]." (App. 18a.) In fact, Miller's argument in the Seventh Circuit by appointed counsel included Sixth Circuit authority dictating a new trial under similar facts that Miller did not raise in the district court when he was forced to proceed *pro se* from prison. *See Clinkscale v. Carter*, 375 F.3d 430 (6th Cir. 2004). Importantly, the divided panel's decision now stands in direct conflict with this Sixth Circuit authority.

In *Clinkscale*, a prisoner brought a habeas petition in which he claimed, *inter alia*, that his trial attorneys' failure to file a timely notice of alibi constituted ineffective assistance in violation of the Sixth Amendment. *See Clinkscale*, 375 F.3d at 435; *see generally Strickland v. Washington*, 466 U.S. 668, 687 (1984) (providing the familiar two-part test for ineffective assistance of counsel claims: "counsel's performance was deficient" and "the deficient performance prejudiced the defense"). The Sixth Circuit reversed the district court's denial of the habeas petition and granted a new trial. *See Clinkscale*, 375 F.3d at 446. The court held that the attorneys' representation was objectively unreasonable under *Strickland*'s deficiency prong because:

"[a]t least where–as here–alibi is a critical aspect of a defendant's defense, there is nothing reasonable about failing to file an alibi notice within the time prescribed by the applicable rules when such failure risks wholesale exclusion of the defense." *Id.* at 443. The Sixth Circuit also held that the attorneys' representation prejudiced Clinkscale's defense. *Id.* at 444. The court noted that "no legal authority has been identified–and we are aware of none–specifically requiring that a defendant claiming ineffectiveness of counsel based on the failure to file a timely alibi notice must produce an affidavit from the potential alibi witnesses documenting the substance of their anticipated testimony." *Id.* It also explained that, in any event, Clinkscale had in fact submitted an affidavit from his father, and the record contained other evidence "that provides some indication of the facts" to which his father, his close friend, and his girlfriend "might have testified if called as alibi witnesses." *Id.* Finally, the Court reasoned that "because the central focus of Clinkscale's trial was the identity of the perpetrator, the evidence essentially boiled down to a credibility contest . . . . Under these circumstances, Clinkscale's inability to provide any supporting testimony for his strongest defense must be considered especially damaging and prejudicial." *Id.* at 445.

While the Sixth Circuit granted Clinkscale a new trial, and Miller's appeal involves the same claim and similar facts, the divided panel of the Seventh Circuit summarily affirmed and denied Miller any form of relief. As in *Clinkscale*, Miller brought an ineffective assistance of counsel claim because his attorneys failed to, *inter alia*, timely provide notice of three alibi witnesses. Also, as in *Clinkscale*, the record makes clear that Miller's attorneys provided objectively unreasonable representation because, *inter alia*, their failure to timely provide notice of the alibi witnesses led to the exclusion of the witnesses' alibi testimony. (R. 113 at 3:3-6:6; R. 118 at 72:17-23.) Finally, as in *Clinkscale*, Miller provided sufficient evidence that this failure prejudiced his alibi defense.

Record evidence establishes the identity of Miller's three alibi witnesses, that the witnesses appeared in court to testify on Miller's behalf, and that the witnesses would have

provided valuable alibi testimony that Miller was out of town on the day in question:

- *Jacqueline Pollard*, Miller's mother, and *Princess Jordan*, Miller's former girlfriend, both arrived at court to testify as alibi witnesses on Miller's behalf but were excluded due to the notice failure. (R. 113 at 5:16-6:6.) According to a formerly sealed motion for subpoenas, which Magistrate Judge Crocker granted, Pollard and Jordan "will testify that, while not actually with the defendant at the specific time of the alleged sale in Madison, they had seen him in Chicago on May 10, 2001, as well as throughout the week of May 7, 2001." (R. 47 at 1-2.) The government confirmed this fact when it argued for the alibi witnesses' exclusion. The government stated that from the investigator interview notes Miller's attorney faxed to it, "it does appear Princess Jordan and [Jacqueline] Pollard may have had something to say to him about seeing Mr. Miller on or about this date of May 10th." (R. 113 at 4:16-22.)

- *Sheneka Ware*, Miller's sister, testified at the trial. But, when she began answering that she had personal knowledge of whether Miller went out of town on May 6 or 7, 2001, the government objected based upon the notice of alibi ruling and the court sustained the objection. (R. 118 at 72:17-23.)

As in *Clinkscale*, this record evidence "provides some indication of the facts" to which Miller's mother, former girlfriend, and sister "might have testified if called as alibi witnesses."[4] *See Clinkscale*, 375 F.3d at 444.

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[4] In the four affidavits Miller submitted in the district court as part of his § 2255 proceedings, his attorneys admitted to their ineffective assistance and alibi witnesses Pollard and Ware elaborated on the substance of their proposed alibi testimony contained in the record. (R. 148; R. 150; R. 151; R. 152.) The district court denied the affidavits as untimely, and ruled in the alternative that the affidavits would not change the outcome of its denial of Miller's § 2255 petition. (App. 29a.) Counsel challenged both rulings in Miller's briefs before the divided panel.

The prejudice Miller suffered from the exclusion of this alibi witness testimony is even more evident when one examines the lack of concrete evidence connecting Miller to the drug sales. The government did not arrest Miller on site, make any electronic recordings of the deals despite contemporaneous police surveillance, or present any fingerprints linking Miller to the deals on the drugs or marked money. Moreover, the identification evidence presented by the government was thin and upon proper challenge with a reasonably presented alibi defense, "there is a reasonable probability that . . . the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. First, the identification testimony offered by Gonzalez is questionable given, *inter alia*, the fact that his identification of Miller on May 10, 2001, was made from a photograph array that contained eleven photographs, all of which were of Miller. (R. 39 at 25:22-26:11, 31:4-14.) Moreover, Gonzalez shredded the notes upon which he made his May 10, 2001 police reports based upon a "personal" policy. (R. 113 at 29:11-30:20.) Second, considerable credibility issues are also present with respect to the testimony of Winfield, Miller's former co-defendant, including, *inter alia*, the fact that Winfield received substantial benefits from the government for his testimony and the fact that Winfield reviewed the police reports describing Gonzalez's version of the events prior to testifying at trial. (*Id.* at 71:22-72:13, 73:18-74:23.)

At bottom, as in *Clinkscale*, "because the central focus of [Miller's] trial was the identity of the perpetrator, the evidence essentially boiled down to a credibility contest . . . . Under these circumstances, [Miller's] inability to provide any supporting testimony for his strongest defense must be considered especially damaging and prejudicial." *Id.* at 445. Under the holdings of *Clinkscale*, Miller should receive a new trial. At a minimum, therefore, Miller should receive an evidentiary hearing. The divided panel's failure to grant such relief is inherently contrary to the Sixth Circuit's decision in *Clinkscale* and, as set forth below, is in direct conflict with 28 U.S.C. § 2255.

B. The Divided Panel Of The Seventh Circuit's Decision Conflicts With The Standard For An Evidentiary Hearing Mandated By 28 U.S.C. § 2255

The divided panel of the Seventh Circuit's summary affirmation and adoption of the district court's opinion fails to directly address counsel's appellate challenge to the district court's denial of an evidentiary hearing. Yet, Miller's allegations of ineffective assistance of counsel and supporting evidence do not "conclusively show that [Miller] is entitled to no relief." 28 U.S.C. § 2255. The record contains sufficient evidence of the excluded alibi testimony from the witnesses, that if believed by the trier of fact, places Miller out of town on the day in question. Such circumstances, at a minimum, warrant an evidentiary hearing. *See Machibroda v. United States*, 368 U.S. 487, 496 (1962) (holding that the district court should have granted an evidentiary hearing because while the "factual assertions of the petitioner [were] improbable . . . [i]f the allegations are true, the petitioner is clearly entitled to relief"); *Koskela v. United States*, 235 F.3d 1148, 1149-50 (8th Cir. 2001) (holding that the district court abused its discretion in finding an evidentiary hearing unnecessary where the record contained conflicting evidence regarding counsel's decision not to present alibi witnesses which arguably lacked credibility); *see generally Clinkscale*, 375 F.3d at 444 n.9 (finding state's argument that defendant's father "'only barely provide[s] an alibi for [defendant]' because '[defendant] could certainly have driven from Columbus to Youngstown in the hours between the shooting and the time his father allegedly saw him that morning'" unavailing and merely a credibility issue ultimately for the jury).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 6, 2006

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UNPUBLISHED ORDER

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

June 1, 2006

No. 05-1616

STACEY MILLER,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Wisconsin
No. 04 C 527
Barbara B. Crabb, *Chief Judge*

[Filed June 1, 2006]

Before: BAUER, POSNER, and RIPPLE, Circuit Judges.

ORDER

Judge William J. Bauer and Judge Richard A. Posner summarily AFFIRM and adopt as their own the attached opinion and order of the district court dated December 29, 2004, and the orders dated March 8, 2005. Judge Kenneth F. Ripple's dissent is also attached.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

04-C-0527-C
01-CR-0071-C-02

UNITED STATES OF AMERICA,

Plaintiff,

v.

STACEY MILLER,

Defendant.

[Entered Dec. 29, 2004]
[Filed Dec. 30, 2004]

OPINION AND ORDER

Defendant Stacey Miller's motion, filed pursuant to 28 U.S.C. § 2255, is before the court following the completion of briefing on the motion. When defendant filed the motion, he set out 31 grounds in support of his motion. (The grounds are numbered 1 through 32, but there is no # 20.) I dismissed # 32 because it relates to defendant's contention that the court sentenced him unconstitutionally by relying on facts not found by a jury beyond a reasonable doubt in violation of *Blakely v. Washington*, 124 S. Ct. 2531 (2004). I held that it was premature to raise this claim because the United States Supreme Court has not decided whether the holding in *Blakely* applies to federal cases. *See* Aug. 5, 2004 Order, dkt. # 139. The remaining 30 claims are summarized as follows:

1. Defendant was denied a fair trial when police officer Twing pressured his subordinate, Gonzales [sic], to make a false identification of defendant.

2. Defendant was denied a fair trial when officer Twing showed Gonzales [sic] a second single person photo array (after he had failed to identify defendant from an earlier array) that was impermissibly suggestive and substantively unreliable.

3. The government engaged in prosecutorial misconduct when it failed to preserve the police notes of officer Twing and produce them upon request.

4. The government engaged in prosecutorial misconduct when it failed to produce surveillance photos, notes and reports concerning defendant's co-defendant Mark Winfield's apartment showing his daily visitors.

5. The government coerced Winfield into fabricating testimony depicting defendant as a drug dealer.

6. The government's prosecution of defendant was undertaken in retaliation for his refusal to become a police informant and his petitioning the police to cease their harassment of him.

7. The court denied defendant a fair trial by failing to grant him a third continuance when his backup counsel was not prepared to represent him.

8. The court denied defendant equal protection when it refused to grant a third continuance in a situation in which it would have give [sic] a Caucasian defendant a continuance.

9. The court denied defendant a fair trial when it refused to hold a photo lineup to give him an opportunity to show that Gonzales [sic] had misidentified him.

10. The government denied defendant a fair trial when it knowingly elicited false testimony from its witnesses.

11. The government interfered with defendant's right to present witnesses favorable to him by intimidating his witnesses with threats of prosecution for perjury if they testified falsely.

12. The court denied defendant his right to effective counsel when it failed either to grant a continuance or to appoint counsel that would have been prepared for trial.

13. The government engaged in misconduct when it used Fed. R. Evid. 404(b) evidence against defendant after having waived its right to do so at the October pretrial conference.

14. The government engaged in misconduct when it failed to divulge witness Twing's penchant for testifying falsely about things defendant never told him.

15. The government deprived defendant of a fair trial when it used its examinations of witnesses and closing statement to intimate that defendant had fabricated his alibi witness testimony.

16. The court denied defendant his rights under the confrontation clause when it refused to grant defense counsel a continuance to prepare for her cross-examination of the government's witnesses.

17. The court denied defendant his right to present a defense when it refused to permit three additional alibi witnesses to testify because defense counsel had failed to identify them in the time allotted to him.

18. The court denied him his right to testify in his own behalf when it refused to give his defense counsel time to consult with defendant to develop his strategy for his defense.

19. The government's failure to divulge the fact that the cocaine base contained over 75% unusable material was a violation of *Brady*.

20. [omitted by defendant].

21. The court violated its obligations under Fed. R. Crim. P. 32 when it did not give detailed findings regarding defendant's objections to the drug quantities for which he was held responsible under the sentencing guidelines.

22. The government did not meet its burden of proof on defendant's relevant conduct.

23. The government's failure to meet its burden of proof on defendant's relevant conduct was a violation of *Apprendi*.

24. The court misinterpreted the sentencing guidelines when it enhanced defendant's sentence for conduct uncharged in the indictment.

25. The court violated U.S.S.G. § 3C1.1 when it enhanced defendant's sentence for obstruction of justice after finding that defendant had tried to present untruthful alibi witnesses.

26. Defendant's counsel failed to subpoena police and civilian records to prove that the case against him was fabricated in retaliation for his refusal to become an informant.

27. Defendant's trial counsel gave defendant ineffective assistance and deprived him of a fair trial.

28. Defendant's trial counsel gave him ineffective assistance at sentencing when she failed to call witnesses who could testify about the makeup of the cocaine base.

29. Defendant's appellate counsel was ineffective in failing to investigate or raise legally significant issues and to keep defendant informed of the status of the appeal.

30. The court violated defendant's right to present an alibi defense by punishing him with a sentence enhancement for presenting perjured testimony.

31. The government failed to seek a reduction in defendant's sentence under Fed. R. Crim. P. 35 or U.S.S.G. § 5K1.1 as it had promised.

I conclude that defendant cannot proceed on any of these claims. Some are barred because he raised them on his direct appeal; some are barred because he could have raised them on direct appeal and chose not to; and the majority are barred because defendant has not supported them with specific evidence but has merely set out conclusory and self-serving allegations.

BACKGROUND

Defendant was charged in an indictment returned on June 28, 2001, with one count of distributing five grams or more of cocaine base with co-defendant Mark Winfield and one count of distributing five grams or more of cocaine base himself. The court appointed James Cooley to represent defendant and set a trial date for November 19, 2001.

On September 27, 2001, the government filed an alibi notice demand pursuant to Fed. R. Crim. P. 12.1. Defendant filed certain pretrial motions, including one to suppress any in-court identification of him by the undercover police officer and another to bar the government from using the out-of-court identifications. He filed his notice of alibi on October 10, 2001, naming Carleton Higgins as an alibi witness; on November 5, 2001, he filed an amended notice, naming Robert Morgan as another alibi witness and said that both witnesses would confirm that he was in Chicago, Illinois between 3:00 and 5:00 p.m. on May 10, 2001, when the critical drug transaction was occurring in Madison, Wisconsin.

On November 19, 2001, with prospective jurors in the courthouse, Cooley advised the court that he was too ill to proceed with the case on that date. The trial was set over to December 10, 2001. On December 4, counsel asked for another postponement, which was granted on the condition that Cooley arrange for backup counsel who would be prepared to go forward with defendant's representation if Cooley became ill again.

Trial was set to begin on January 28, 2002. Backup counsel Krista Ralston appeared on defendant's behalf to say that Cooley was ill again and that she did not believe she was adequately prepared to handle the trial in his stead. The court denied the motion for a third continuance; the trial went forward with Ralston representing defendant. At the end of the second day of trial, the jury returned a verdict of guilty and found that defendant had been responsible for the distribution of more than five grams of cocaine base.

The evidence at trial included testimony from co-defendant Mark Winfield, who described his involvement with defendant in the distribution of crack cocaine; police officer Bernard Gonzales [sic], who had spent long periods of time with defendant while operating in an undercover capacity; police officer Jeff Twing, the case manager for the investigation of defendant, who testified about his surveillance of defendant during drug buys by Gonzales [sic] and, on rebuttal, about his interview of defendant's alibi witness, Robert Morgan; and two representatives of wireless phone companies, who testified about calls made on cell

phones to numbers used by defendant and his co-defendant. Defendant called as witnesses his sister, Sheneka Ware; Joseph Bryan, who testified that while he was in the Dane County jail, he heard Mark Winfield tell defendant that Winfield was going to tell the truth and testify that defendant was not at the house when the drug deal took place, but that he was going to wait until the government offered him a plea bargain; and alibi witness Robert Morgan, who testified that he had seen defendant in Chicago at defendant's mother's house in the morning and afternoon on May 10, 2001 and again the next morning.

Defendant was sentenced on April 12, 2002. His criminal category was VI. With more than 5 grams of cocaine as proved conduct and an upward adjustment for obstruction of justice (presenting a false alibi), his offense level was 38 and his guideline range was 360 months to life. (Without any enhancement for obstruction of justice, defendant would have had an offense level of 37 as a career offender and a guideline range of 360 months to life.) He was sentenced to 400 months. He filed a timely notice of appeal on April 26, 2002, arguing that the denial of his request for a third continuance was a denial of his right to a fair trial. Originally, he raised the question of the ineffectiveness of counsel; at oral argument, he decided to save the issue for his post-conviction motion. The court of appeals affirmed his conviction, finding that the denial of the motion for a third continuance was not an abuse of discretion and not a denial of defendant's right to a fair trial.

OPINION

Section 2255 motions are not intended to be substitutes for direct appeals or as a means of appealing the same issues a second time. As a general rule, they are to be used only for raising alleged errors of law that are jurisdictional or constitutional in nature or that amount to a fundamental defect that results in a complete miscarriage of justice. *Reed v. Farley*, 512 U.S. 339, 353-54 (1994). They cannot be used for issues that were raised on direct appeal in the absence of changed circumstances, for non-constitutional issues that could have been raised on direct appeal but were not or for constitutional issues that were not raised on direct appeal, unless the movant can establish cause for the default

as well as actual prejudice from the failure to appeal. *Prewitt v. United States*, 83 F.3d 812, 816 (7th Cir. 1996).

Defendant's claims numbered 7, 12, 16 and 18 are all aspects of his contention that he should not have been denied his request for a third continuance. Defendant raised this issue on direct appeal and it was decided against him. He cannot reargue it in this motion. He raises a variant of this claim (# 8), alleging that the court would not have denied the continuance had he been Caucasian. It is arguable that he could not have raised this claim on direct appeal because its determination would rest on evidence that would not be part of the trial record. However, it is unnecessary to decide whether he should be able to raise it on this motion because he has no evidence to support the claim. He merely alleges that the court gives different treatment to members of different races. He does not set forth any facts that would support his allegation. Mere speculation does not warrant relief or even an evidentiary hearing. *Galbraith v. United States*, 313 F.3d 1001 (7th Cir. 2002) (in order to show need for evidentiary hearing, § 2255 movant must file detailed and specific affidavit showing he has actual proof of allegations he is making).

Defendant's claims 1, 2 and 9 relate to alleged deficiencies in the procedure used to identify him. Defendant had a full evidentiary hearing on these issues but never raised them on direct appeal. He has suggested no reason why he could not have raised them, other than to say that his appointed appellate counsel did not listen to him. This statement falls short of establishing cause for the default, even if he could establish that the identification process deprived him of a constitutional right.

Claims 3, 4, 5, 6, 10, 11, 13 and 14 relate to defendant's allegations that "the government" engaged in various forms of misconduct. None of these allegations are supported by any evidence or even any specific allegations so as to trigger a need for an evidentiary hearing. As I have noted, mere unsupported assertions are not sufficient to require an evidentiary hearing. *Galbraith*, 313 F.3d at 1001. As to claim # 5, moreover, which relates to alleged governmental coercion of co-defendant Winfield to testify falsely, defendant's counsel cross-examined Winfield at depth about

his reasons for testifying, including his hope that he would get a shorter sentence in return for testifying against defendant.

Defendant's claim # 15 is that the government deprived him of a fair trial when it used its examinations of witnesses and its closing statement to intimate that defendant had fabricated his alibi witness testimony. The government's statements were well within the bounds of propriety. It is permissible for a prosecutor to cross-examine alibi witnesses and then to argue that they are not believable because of discrepancies in their testimony or, as in the case of defendant's alibi witness, because of his admission that if defendant had asked him to lie, he would not admit that fact under oath.

In claim # 17, defendant alleges that he was denied a fair trial when the court refused to permit three additional alibi witnesses to testify because trial counsel had failed to identify them. Defendant could have raised this claim on direct appeal. He does not explain why he did not. Thus, even if it were a potential constitutional violation to be deprived of the testimony of witnesses he wanted, rather than a matter of interpretation of a rule of procedure, defendant has not shown the necessary cause and prejudice he must show if he wishes to raise this issue in his § 2255 motion.

Defendant's claims numbered 19, 21, 22, 23, 24, 25 and 30 relate to his sentencing. As a general rule, challenges to sentencing issues cannot be raised in a motion pursuant to § 2255. *Scott v. United States*, 997 F.2d 340 (7th Cir. 1993). Rarely does a dispute over the application of the guidelines implicate a jurisdictional or constitutional error of law or constitute a fundamental defect resulting in a complete miscarriage of justice. Certainly, the issues that defendant has raised do not rise to that level[.] In claim # 19, for example, defendant challenges the government's failure to divulge the non-usable part of the cocaine base for which he was held responsible. Not only is this not a constitutional issue, it is not even an issue under the guidelines, which provide that the weight of a controlled substance set forth in the sentencing guidelines tables includes the "entire weight of any mixture or substance containing a detectable amount of the controlled substance." U.S.S.G. § 2D1.1, Notes to

Drug Quantity Table (A). Defendant may think that he has a right to be sentenced only for the actual amount of controlled substance he possessed but the sentencing commission does not agree. Therefore, even if the government had been required to advise defendant of the composition of the mixture, its failure to do so did not change anything for defendant. He would still have been sentenced on the basis of the entire weight of the mixture containing the crack cocaine.

Defendant's other sentencing claims require little comment, particularly in light of the fact that defendant conceded before sentencing that he had a guideline level of 37, a criminal history of VI and a guideline imprisonment range of 360 months to life. It was not a misinterpretation of the guidelines to enhance defendant's sentence for conduct that had not been charged (# 24) because the guidelines give the courts specific authority to consider relevant uncharged conduct. It was not error for the court to omit specific findings on drug amounts when defendant's co-defendant had stipulated to the amount for which defendant was held accountable (# 21). Even if it was error, defendant would not be entitled to a shorter sentence because his career offender status put him in level 37, with or without the drug amounts. The same conclusion applies to defendant's assertions that the government did not meet its burden of proof on his relevant conduct (# 22) and that the court violated the guidelines in enhancing his sentence for obstruction of justice (# 25). As to defendant's assertion that the government violated the holding of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the jury found beyond a reasonable doubt that defendant had been responsible for the distribution of more than five grams of cocaine, thus removing any question of compliance with *Apprendi*. *Apprendi* requires jury findings only when the finding would affect the *statutory* maximum applicable to a defendant, not to the sentencing guideline level that could be applied.

As to defendant's last sentencing claim, # 30, that the court violated his right to present an alibi defense by punishing him with a sentence enhancement for presenting perjured testimony, defendant has a right to present alibi witnesses but no right to present false testimony from those witnesses. Giving him a sentence enhancement for

suborning perjury is no more a violation of his rights than giving him an enhancement for giving perjured testimony himself. *United States v. Dunnigan*, 507 U.S. 87 (1993) (holding that potential enhancement of sentence for testifying falsely is not violation of defendant's right to testify).

Defendant's claims 26-29 relate to his assertion that both his trial counsel and his appellate counsel were ineffective as a matter of law. Claim # 28 relates to the makeup of the cocaine base; because the composition of the cocaine base is irrelevant in sentencing, as explained above, it was not ineffective assistance for defendant's trial counsel to fail to call witnesses to testify on this issue. The other three claims are unsupported by any specific assertions. Defendant has not filed an affidavit setting forth with precision exactly what his counsel did or failed to do that made a difference in the outcome of the proceedings. He asserts that his trial counsel failed to develop proof of the government's retaliatory motive against him but he has not met his burden of showing what form that proof would have taken. *Hardamon v. United States*, 319 F.3d 943, 951 (7th Cir. 2003).

To establish ineffectiveness of counsel, defendant must show that counsel's actions were not supported by a reasonable strategy and that the error was prejudicial. *Massaro v. United States*, 538 U.S. 500, 505 (2003). The presumption is that defense counsel has rendered adequate assistance and exercised her reasonable professional judgment in making decisions about trial strategy. Defendant has not made the necessary showing that his counsel made errors so serious that she was not functioning as the counsel guaranteed him under the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 680, 688 (1984). Although he asserts that trial counsel failed to subpoena helpful witnesses for the trial and for the sentencing, he has not provided sufficiently precise information of what those witnesses would have contributed to the proceedings. *Hardamon*, 319 F.3d at 951.

Finally, in claim # 30, defendant contends that the government failed to seek the reduction of defendant's sentence that it had promised him for his substantial assistance. The simple contention that the government failed

to carry out its promise of a sentencing recommendation is not one that defendant can pursue on a motion for post-conviction relief. "A defendant has no constitutionally protected right to a downward departure based on alleged substantial assistance to the government." *United States v. Kelly*, 14 F.3d 1169, 1177 (7th Cir. 1994). Because the defendant has no right to a departure, the court cannot require the government to file a motion for a reduced sentence under either U.S.S.G. § 5K1.1 or Fed. R. Crim. P. 35(b). An exception exists if the defendant can show that the government's refusal to act is motivated by an unconstitutional reason such as racial discrimination. The government's power is "subject to constitutional limitations that district courts can enforce." *Wade v. United States*, 504 U.S. 181, 185 (1992). However, "'the burden is on the defendant to make a substantial threshold showing [of unconstitutional motive] before he becomes entitled to an evidentiary hearing on the matter.'" *United States v. Carter*, 122 F.3d 469, 476 (7th Cir. 1997) (quoting *Kelly*, 14 F.3d at 1177-78). Defendant has made no showing that unconstitutional motives tainted the government's decision to withdraw its motion for a sentencing reduction.

One additional matter remains. On December 13, 2004, long after the time for briefing had expired, defendant filed a request for submission of certain affidavits in support of his § 2255 motion. The request will be denied for untimeliness, but the affidavits would have not have changed the outcome of this motion. The affidavits of Krista Ralston and James Cooley are insufficient to show that defendant received constitutionally ineffective representation; the affidavits of defendant's friend Jacqueline Pollard and his sister Sheneka Davis are not specific and are based in large part on hearsay. Defendant's own affidavit focuses on his appellate counsel and his alleged deficiencies but says only that he asked counsel to raise the obstruction of justice enhancement, the drug quantity determination, the lack of a prior identification procedure and "the deficiencies in the indictment." (Defendant has never alleged that the indictment was deficient in any respect and he does not explain in his affidavit what these deficiencies might be.) As I have explained, neither the obstruction of justice enhancement nor the drug quantity determination are matters that can be raised

in a § 2255 motion, even if defendant could show cause for the failure to raise them on direct appeal. In any event, neither determination would entitled [sic] defendant to a shorter sentence, even if he could show that they were erroneous. As for the lack of a prior identification procedure, defendant had a full opportunity to develop this challenge prior to trial; it is not surprising that his appellate counsel would not think it was worth raising on appeal. Defendant has failed to explain what he thinks his appellate counsel could have done differently or how the outcome of his appeal would have changed had counsel challenged the identification procedure.

ORDER

IT IS ORDERED that defendant Stacey Miller's motion for vacation or reduction of his sentence brought pursuant to 28 U.S.C. § 2255 is DENIED in all respects. FURTHER, IT IS ORDERED that defendant's motion to submit untimely affidavits in support of his motion is DENIED.

Entered this 29th day of December, 2004.

BY THE COURT:

s/ BARBARA B. CRABB
BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

04-C-527-C
01-CR-0071-C-02

UNITED STATES OF AMERICA,

Plaintiff,

v.

STACEY MILLER,

Defendant.

[Entered Mar. 8, 2005]
[Filed Mar. 9, 2005]

ORDER

The order entered in this case on December 29, 2004, is amended in the following respect: At the beginning of the last paragraph on page 14, the number 30 is deleted and the number 31 is inserted therefor.

In all other respects, the order remains as entered on December 29, 2004.

Entered this 8th day of March, 2005.

BY THE COURT:

s/ BARBARA B. CRABB
BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

04-C-527-C
01-CR-0071-C-02

UNITED STATES OF AMERICA,

Plaintiff,

v.

STACEY MILLER,

Defendant.

[Entered Mar. 8, 2005]
[Filed Mar. 9, 2005]

ORDER

Defendant Stacey Miller has filed a "Petition for a Certificate of Appealability." He has not filed a notice of appeal from the judgment entered in this case on December 30, 2004, although the time for filing such a notice expired on March 1, 2005, the date on which he filed this petition. Despite the lack of a notice of appeal, I will decide the motion for a certificate of appealability, which defendant must have if he is to appeal the denial of his motion for post conviction relief brought pursuant to 28 U.S.C. § 2255. *See* 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22. Such a certificate shall issue "only if the applicant has made a substantial showing of the denial of a constitutional right." § 2253(c)(2).

Before issuing a certificate of appealability, a district court must find that the issues the applicant wishes to raise are ones that "are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983).

In his request for a certificate of appealability, defendant has identified two issues he wants to appeal. I am prepared to issue a certificate of appealability with respect to one of the two issues.

First, defendant contends that trial counsel gave him ineffective assistance. This contention relates to claims numbered 26-29 in his motion. In deciding the motion as to those claims, I found that petitioner had failed to support his allegations with specific details about his counsel's deficiencies. Although I believe that defendant failed to show his entitlement to relief under § 2255 because of his counsel's alleged constitutional deficiencies, I cannot say that a reasonable judge would not make a different decision. Therefore, I will issue a certificate of appealability as to the claims numbered 26-29 in defendant's motion.

Second, defendant contends that the court erred in denying his claim that he was sentenced unconstitutionally by relying on facts not found by a jury beyond a reasonable doubt in violation of *Blakely v. Washington*, 124 S. Ct. 2531 (2004). In an order dated August 5, 2004, I told defendant that it was premature to raise the claim because the United States Supreme Court had not decided whether the holding in *Blakely* applied to federal cases. For this reason, I did not order the government to respond to this claim. It was unnecessary to discuss the claim again in the December 29 order because the Supreme Court had not yet decided *Booker* when I denied petitioner's motion for post conviction relief. Defendant is not entitled to a certificate of appealability on this issue. He has no basis on which to raise a claim under *Blakely* or *Booker*. On January 12, 2005, the Supreme Court rendered its opinion in *United States v. Booker*, 04-104 (U.S. Jan. 12, 2005). It held that defendants in federal criminal cases have a right to a jury determination of any disputed factual subject that increases the maximum punishment. The Court held also that the Sentencing Guidelines are unconstitutional to the extent they require judges to base sentences on facts that are not the product of factfinding by a jury but that the guidelines are not unconstitutional if judges use them for advisory purposes. The Court did not address the retroactivity of its decision on cases on collateral review, leaving it uncertain whether the right has retroactive application. Unfortunately for defendant, on February 2,

2005, the Court of Appeals for the Seventh Circuit resolved the retroactivity uncertainty, at least for motions filed in this circuit asserting the right newly recognized in *Booker*. In *McReynolds v. United States*, 397 F.3d 479 (7th Cir. 2005), the court held that the rights recognized in *Booker* do not apply retroactively on collateral review. The court of appeals characterized the decision as a procedural one and noted that, as a general rule, procedural decisions do not apply retroactively unless they establish one of those rare "'watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.'" *Id.* at 4 (quoting *Schriro v. Summerlin*, 124 S. Ct. 2519 (2004)). The court concluded that *Booker* did not establish a "watershed rule"; "the choice between judges and juries as factfinders does not make such a fundamental difference." *Id.* The court was persuaded that the *Booker* decision would not change the process of sentencing in any significant way: defendants would continue to be sentenced as they have been, with the only difference being "the degree of flexibility judges would enjoy in applying the guideline system." *Id.* Now that the court of appeals has decided that *Booker* has no retroactive application, defendant cannot succeed in showing that he is entitled to a modification of his sentence based upon that decision. Because this issue is not debatable among reasonable jurists, a court could not resolve the issues differently and the question is not adequate to deserve encouragement to proceed further, I decline to issue a certificate of appealability.

ORDER

IT IS ORDERED that defendant Stacey Miller's request for a certificate of appealability is GRANTED as to his ineffective assistance of counsel claim and DENIED as to his claim premised on *Blakely v. Washington*.

Entered this 8th day of March, 2005.

BY THE COURT:

s/ BARBARA B. CRABB
BARBARA B. CRABB
District Judge

RIPPLE, *Circuit Judge*, dissenting. In my view, summary affirmance on the basis of a memorandum order issued by the district court should be reserved for the most extraordinary of situations. This principle is especially true when the decision of this court is not the product of the usual processes of decision-making, but of a preliminary screening. Before we truncate the usual appellate procedures, at a minimum, the appeal ought to be facially frivolous, or the writing of the district court should be so extensive that it fairly can be said to be responsive to all the arguments made by the appellant in this court. In any event, our basis of decision should be clear to the Supreme Court of the United States when it reviews our decision if a petition for certiorari is filed.

In the case before us, the appeal cannot be considered facially frivolous. Indeed, both parties have submitted extensive and thoughtful briefs. Nor can the discussion of the issue on appeal by the district court be said to be totally responsive to the presentation of the appellant in this court. Finally, our order in this case, adopting the order of the district court, does not fulfill our obligation to provide the Supreme Court with an adequate explanation of our decision.

Accordingly, I respectfully dissent from the order issued by the court today. I would set this case for oral argument in due course.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

04-C-0527-C
01-CR-0071-C-02

UNITED STATES OF AMERICA,

Plaintiff,

v.

STACEY MILLER,

Defendant.

[Entered Dec. 29, 2004]
[Filed Dec. 30, 2004]

OPINION AND ORDER

Defendant Stacey Miller's motion, filed pursuant to 28 U.S.C. § 2255, is before the court following the completion of briefing on the motion. When defendant filed the motion, he set out 31 grounds in support of his motion. (The grounds are numbered 1 through 32, but there is no # 20.) I dismissed # 32 because it relates to defendant's contention that the court sentenced him unconstitutionally by relying on facts not found by a jury beyond a reasonable doubt in violation of *Blakely v. Washington*, 124 S. Ct. 2531 (2004). I held that it was premature to raise this claim because the United States Supreme Court has not decided whether the holding in *Blakely* applies to federal cases. *See* Aug. 5, 2004 Order, dkt. # 139. The remaining 30 claims are summarized as follows:

1. Defendant was denied a fair trial when police officer Twing pressured his subordinate, Gonzales [sic], to make a false identification of defendant.

2. Defendant was denied a fair trial when officer Twing showed Gonzales [sic] a second single person photo array (after he had failed to identify defendant from an earlier array) that was impermissibly suggestive and substantively unreliable.

3. The government engaged in prosecutorial misconduct when it failed to preserve the police notes of officer Twing and produce them upon request.

4. The government engaged in prosecutorial misconduct when it failed to produce surveillance photos, notes and reports concerning defendant's co-defendant Mark Winfield's apartment showing his daily visitors.

5. The government coerced Winfield into fabricating testimony depicting defendant as a drug dealer.

6. The government's prosecution of defendant was undertaken in retaliation for his refusal to become a police informant and his petitioning the police to cease their harassment of him.

7. The court denied defendant a fair trial by failing to grant him a third continuance when his backup counsel was not prepared to represent him.

8. The court denied defendant equal protection when it refused to grant a third continuance in a situation in which it would have give [sic] a Caucasian defendant a continuance.

9. The court denied defendant a fair trial when it refused to hold a photo lineup to give him an opportunity to show that Gonzales [sic] had misidentified him.

10. The government denied defendant a fair trial when it knowingly elicited false testimony from its witnesses.

11. The government interfered with defendant's right to present witnesses favorable to him by intimidating his witnesses with threats of prosecution for perjury if they testified falsely.

12. The court denied defendant his right to effective counsel when it failed either to grant a continuance or to appoint counsel that would have been prepared for trial.

13. The government engaged in misconduct when it used Fed. R. Evid. 404(b) evidence against defendant after having waived its right to do so at the October pretrial conference.

14. The government engaged in misconduct when it failed to divulge witness Twing's penchant for testifying falsely about things defendant never told him.

15. The government deprived defendant of a fair trial when it used its examinations of witnesses and closing statement to intimate that defendant had fabricated his alibi witness testimony.

16. The court denied defendant his rights under the confrontation clause when it refused to grant defense counsel a continuance to prepare for her cross-examination of the government's witnesses.

17. The court denied defendant his right to present a defense when it refused to permit three additional alibi witnesses to testify because defense counsel had failed to identify them in the time allotted to him.

18. The court denied him his right to testify in his own behalf when it refused to give his defense counsel time to consult with defendant to develop his strategy for his defense.

19. The government's failure to divulge the fact that the cocaine base contained over 75% unusable material was a violation of *Brady*.

20. [omitted by defendant].

21. The court violated its obligations under Fed. R. Crim. P. 32 when it did not give detailed findings regarding defendant's objections to the drug quantities for which he was held responsible under the sentencing guidelines.

22. The government did not meet its burden of proof on defendant's relevant conduct.

23. The government's failure to meet its burden of proof on defendant's relevant conduct was a violation of *Apprendi*.

24. The court misinterpreted the sentencing guidelines when it enhanced defendant's sentence for conduct uncharged in the indictment.

25. The court violated U.S.S.G. § 3C1.1 when it enhanced defendant's sentence for obstruction of justice after finding that defendant had tried to present untruthful alibi witnesses.

26. Defendant's counsel failed to subpoena police and civilian records to prove that the case against him was fabricated in retaliation for his refusal to become an informant.

27. Defendant's trial counsel gave defendant ineffective assistance and deprived him of a fair trial.

28. Defendant's trial counsel gave him ineffective assistance at sentencing when she failed to call witnesses who could testify about the makeup of the cocaine base.

29. Defendant's appellate counsel was ineffective in failing to investigate or raise legally significant issues and to keep defendant informed of the status of the appeal.

30. The court violated defendant's right to present an alibi defense by punishing him with a sentence enhancement for presenting perjured testimony.

31. The government failed to seek a reduction in defendant's sentence under Fed. R. Crim. P. 35 or U.S.S.G. § 5K1.1 as it had promised.

I conclude that defendant cannot proceed on any of these claims. Some are barred because he raised them on his direct appeal; some are barred because he could have raised them on direct appeal and chose not to; and the majority are barred because defendant has not supported them with specific evidence but has merely set out conclusory and self-serving allegations.

BACKGROUND

Defendant was charged in an indictment returned on June 28, 2001, with one count of distributing five grams or more of cocaine base with co-defendant Mark Winfield and one count of distributing five grams or more of cocaine base himself. The court appointed James Cooley to represent defendant and set a trial date for November 19, 2001.

On September 27, 2001, the government filed an alibi notice demand pursuant to Fed. R. Crim. P. 12.1. Defendant filed certain pretrial motions, including one to suppress any in-court identification of him by the undercover police officer and another to bar the government from using the out-of-court identifications. He filed his notice of alibi on October 10, 2001, naming Carleton Higgins as an alibi witness; on November 5, 2001, he filed an amended notice, naming Robert Morgan as another alibi witness and said that both witnesses would confirm that he was in Chicago, Illinois between 3:00 and 5:00 p.m. on May 10, 2001, when the critical drug transaction was occurring in Madison, Wisconsin.

On November 19, 2001, with prospective jurors in the courthouse, Cooley advised the court that he was too ill to proceed with the case on that date. The trial was set over to December 10, 2001. On December 4, counsel asked for another postponement, which was granted on the condition that Cooley arrange for backup counsel who would be prepared to go forward with defendant's representation if Cooley became ill again.

Trial was set to begin on January 28, 2002. Backup counsel Krista Ralston appeared on defendant's behalf to say that Cooley was ill again and that she did not believe she was adequately prepared to handle the trial in his stead. The court denied the motion for a third continuance; the trial went forward with Ralston representing defendant. At the end of the second day of trial, the jury returned a verdict of guilty and found that defendant had been responsible for the distribution of more than five grams of cocaine base.

The evidence at trial included testimony from co-defendant Mark Winfield, who described his involvement with defendant in the distribution of crack cocaine; police officer Bernard Gonzales [sic], who had spent long periods of time with defendant while operating in an undercover capacity; police officer Jeff Twing, the case manager for the investigation of defendant, who testified about his surveillance of defendant during drug buys by Gonzales [sic] and, on rebuttal, about his interview of defendant's alibi witness, Robert Morgan; and two representatives of wireless phone companies, who testified about calls made on cell

phones to numbers used by defendant and his co-defendant. Defendant called as witnesses his sister, Sheneka Ware; Joseph Bryan, who testified that while he was in the Dane County jail, he heard Mark Winfield tell defendant that Winfield was going to tell the truth and testify that defendant was not at the house when the drug deal took place, but that he was going to wait until the government offered him a plea bargain; and alibi witness Robert Morgan, who testified that he had seen defendant in Chicago at defendant's mother's house in the morning and afternoon on May 10, 2001 and again the next morning.

Defendant was sentenced on April 12, 2002. His criminal category was VI. With more than 5 grams of cocaine as proved conduct and an upward adjustment for obstruction of justice (presenting a false alibi), his offense level was 38 and his guideline range was 360 months to life. (Without any enhancement for obstruction of justice, defendant would have had an offense level of 37 as a career offender and a guideline range of 360 months to life.) He was sentenced to 400 months. He filed a timely notice of appeal on April 26, 2002, arguing that the denial of his request for a third continuance was a denial of his right to a fair trial. Originally, he raised the question of the ineffectiveness of counsel; at oral argument, he decided to save the issue for his post-conviction motion. The court of appeals affirmed his conviction, finding that the denial of the motion for a third continuance was not an abuse of discretion and not a denial of defendant's right to a fair trial.

OPINION

Section 2255 motions are not intended to be substitutes for direct appeals or as a means of appealing the same issues a second time. As a general rule, they are to be used only for raising alleged errors of law that are jurisdictional or constitutional in nature or that amount to a fundamental defect that results in a complete miscarriage of justice. *Reed v. Farley*, 512 U.S. 339, 353-54 (1994). They cannot be used for issues that were raised on direct appeal in the absence of changed circumstances, for non-constitutional issues that could have been raised on direct appeal but were not or for constitutional issues that were not raised on direct appeal, unless the movant can establish cause for the default

as well as actual prejudice from the failure to appeal. *Prewitt v. United States*, 83 F.3d 812, 816 (7th Cir. 1996).

Defendant's claims numbered 7, 12, 16 and 18 are all aspects of his contention that he should not have been denied his request for a third continuance. Defendant raised this issue on direct appeal and it was decided against him. He cannot reargue it in this motion. He raises a variant of this claim (# 8), alleging that the court would not have denied the continuance had he been Caucasian. It is arguable that he could not have raised this claim on direct appeal because its determination would rest on evidence that would not be part of the trial record. However, it is unnecessary to decide whether he should be able to raise it on this motion because he has no evidence to support the claim. He merely alleges that the court gives different treatment to members of different races. He does not set forth any facts that would support his allegation. Mere speculation does not warrant relief or even an evidentiary hearing. *Galbraith v. United States*, 313 F.3d 1001 (7th Cir. 2002) (in order to show need for evidentiary hearing, § 2255 movant must file detailed and specific affidavit showing he has actual proof of allegations he is making).

Defendant's claims 1, 2 and 9 relate to alleged deficiencies in the procedure used to identify him. Defendant had a full evidentiary hearing on these issues but never raised them on direct appeal. He has suggested no reason why he could not have raised them, other than to say that his appointed appellate counsel did not listen to him. This statement falls short of establishing cause for the default, even if he could establish that the identification process deprived him of a constitutional right.

Claims 3, 4, 5, 6, 10, 11, 13 and 14 relate to defendant's allegations that "the government" engaged in various forms of misconduct. None of these allegations are supported by any evidence or even any specific allegations so as to trigger a need for an evidentiary hearing. As I have noted, mere unsupported assertions are not sufficient to require an evidentiary hearing. *Galbraith*, 313 F.3d at 1001. As to claim # 5, moreover, which relates to alleged governmental coercion of co-defendant Winfield to testify falsely, defendant's counsel cross-examined Winfield at depth about

his reasons for testifying, including his hope that he would get a shorter sentence in return for testifying against defendant.

Defendant's claim # 15 is that the government deprived him of a fair trial when it used its examinations of witnesses and its closing statement to intimate that defendant had fabricated his alibi witness testimony. The government's statements were well within the bounds of propriety. It is permissible for a prosecutor to cross-examine alibi witnesses and then to argue that they are not believable because of discrepancies in their testimony or, as in the case of defendant's alibi witness, because of his admission that if defendant had asked him to lie, he would not admit that fact under oath.

In claim # 17, defendant alleges that he was denied a fair trial when the court refused to permit three additional alibi witnesses to testify because trial counsel had failed to identify them. Defendant could have raised this claim on direct appeal. He does not explain why he did not. Thus, even if it were a potential constitutional violation to be deprived of the testimony of witnesses he wanted, rather than a matter of interpretation of a rule of procedure, defendant has not shown the necessary cause and prejudice he must show if he wishes to raise this issue in his § 2255 motion.

Defendant's claims numbered 19, 21, 22, 23, 24, 25 and 30 relate to his sentencing. As a general rule, challenges to sentencing issues cannot be raised in a motion pursuant to § 2255. *Scott v. United States*, 997 F.2d 340 (7th Cir. 1993). Rarely does a dispute over the application of the guidelines implicate a jurisdictional or constitutional error of law or constitute a fundamental defect resulting in a complete miscarriage of justice. Certainly, the issues that defendant has raised do not rise to that level[.] In claim # 19, for example, defendant challenges the government's failure to divulge the non-usable part of the cocaine base for which he was held responsible. Not only is this not a constitutional issue, it is not even an issue under the guidelines, which provide that the weight of a controlled substance set forth in the sentencing guidelines tables includes the "entire weight of any mixture or substance containing a detectable amount of the controlled substance." U.S.S.G. § 2D1.1, Notes to

Drug Quantity Table (A). Defendant may think that he has a right to be sentenced only for the actual amount of controlled substance he possessed but the sentencing commission does not agree. Therefore, even if the government had been required to advise defendant of the composition of the mixture, its failure to do so did not change anything for defendant. He would still have been sentenced on the basis of the entire weight of the mixture containing the crack cocaine.

Defendant's other sentencing claims require little comment, particularly in light of the fact that defendant conceded before sentencing that he had a guideline level of 37, a criminal history of VI and a guideline imprisonment range of 360 months to life. It was not a misinterpretation of the guidelines to enhance defendant's sentence for conduct that had not been charged (# 24) because the guidelines give the courts specific authority to consider relevant uncharged conduct. It was not error for the court to omit specific findings on drug amounts when defendant's co-defendant had stipulated to the amount for which defendant was held accountable (# 21). Even if it was error, defendant would not be entitled to a shorter sentence because his career offender status put him in level 37, with or without the drug amounts. The same conclusion applies to defendant's assertions that the government did not meet its burden of proof on his relevant conduct (# 22) and that the court violated the guidelines in enhancing his sentence for obstruction of justice (# 25). As to defendant's assertion that the government violated the holding of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the jury found beyond a reasonable doubt that defendant had been responsible for the distribution of more than five grams of cocaine, thus removing any question of compliance with *Apprendi*. *Apprendi* requires jury findings only when the finding would affect the *statutory* maximum applicable to a defendant, not to the sentencing guideline level that could be applied.

As to defendant's last sentencing claim, # 30, that the court violated his right to present an alibi defense by punishing him with a sentence enhancement for presenting perjured testimony, defendant has a right to present alibi witnesses but no right to present false testimony from those witnesses. Giving him a sentence enhancement for

suborning perjury is no more a violation of his rights than giving him an enhancement for giving perjured testimony himself. *United States v. Dunnigan*, 507 U.S. 87 (1993) (holding that potential enhancement of sentence for testifying falsely is not violation of defendant's right to testify).

Defendant's claims 26-29 relate to his assertion that both his trial counsel and his appellate counsel were ineffective as a matter of law. Claim # 28 relates to the makeup of the cocaine base; because the composition of the cocaine base is irrelevant in sentencing, as explained above, it was not ineffective assistance for defendant's trial counsel to fail to call witnesses to testify on this issue. The other three claims are unsupported by any specific assertions. Defendant has not filed an affidavit setting forth with precision exactly what his counsel did or failed to do that made a difference in the outcome of the proceedings. He asserts that his trial counsel failed to develop proof of the government's retaliatory motive against him but he has not met his burden of showing what form that proof would have taken. *Hardamon v. United States*, 319 F.3d 943, 951 (7th Cir. 2003).

To establish ineffectiveness of counsel, defendant must show that counsel's actions were not supported by a reasonable strategy and that the error was prejudicial. *Massaro v. United States*, 538 U.S. 500, 505 (2003). The presumption is that defense counsel has rendered adequate assistance and exercised her reasonable professional judgment in making decisions about trial strategy. Defendant has not made the necessary showing that his counsel made errors so serious that she was not functioning as the counsel guaranteed him under the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 680, 688 (1984). Although he asserts that trial counsel failed to subpoena helpful witnesses for the trial and for the sentencing, he has not provided sufficiently precise information of what those witnesses would have contributed to the proceedings. *Hardamon*, 319 F.3d at 951.

Finally, in claim # 30, defendant contends that the government failed to seek the reduction of defendant's sentence that it had promised him for his substantial assistance. The simple contention that the government failed

to carry out its promise of a sentencing recommendation is not one that defendant can pursue on a motion for post-conviction relief. "A defendant has no constitutionally protected right to a downward departure based on alleged substantial assistance to the government." *United States v. Kelly*, 14 F.3d 1169, 1177 (7th Cir. 1994). Because the defendant has no right to a departure, the court cannot require the government to file a motion for a reduced sentence under either U.S.S.G. § 5K1.1 or Fed. R. Crim. P. 35(b). An exception exists if the defendant can show that the government's refusal to act is motivated by an unconstitutional reason such as racial discrimination. The government's power is "subject to constitutional limitations that district courts can enforce." *Wade v. United States*, 504 U.S. 181, 185 (1992). However, "'the burden is on the defendant to make a substantial threshold showing [of unconstitutional motive] before he becomes entitled to an evidentiary hearing on the matter.'" *United States v. Carter*, 122 F.3d 469, 476 (7th Cir. 1997) (quoting *Kelly*, 14 F.3d at 1177-78). Defendant has made no showing that unconstitutional motives tainted the government's decision to withdraw its motion for a sentencing reduction.

One additional matter remains. On December 13, 2004, long after the time for briefing had expired, defendant filed a request for submission of certain affidavits in support of his § 2255 motion. The request will be denied for untimeliness, but the affidavits would have not have changed the outcome of this motion. The affidavits of Krista Ralston and James Cooley are insufficient to show that defendant received constitutionally ineffective representation; the affidavits of defendant's friend Jacqueline Pollard and his sister Sheneka Davis are not specific and are based in large part on hearsay. Defendant's own affidavit focuses on his appellate counsel and his alleged deficiencies but says only that he asked counsel to raise the obstruction of justice enhancement, the drug quantity determination, the lack of a prior identification procedure and "the deficiencies in the indictment." (Defendant has never alleged that the indictment was deficient in any respect and he does not explain in his affidavit what these deficiencies might be.) As I have explained, neither the obstruction of justice enhancement nor the drug quantity determination are matters that can be raised

in a § 2255 motion, even if defendant could show cause for the failure to raise them on direct appeal. In any event, neither determination would entitled [sic] defendant to a shorter sentence, even if he could show that they were erroneous. As for the lack of a prior identification procedure, defendant had a full opportunity to develop this challenge prior to trial; it is not surprising that his appellate counsel would not think it was worth raising on appeal. Defendant has failed to explain what he thinks his appellate counsel could have done differently or how the outcome of his appeal would have changed had counsel challenged the identification procedure.

ORDER

IT IS ORDERED that defendant Stacey Miller's motion for vacation or reduction of his sentence brought pursuant to 28 U.S.C. § 2255 is DENIED in all respects. FURTHER, IT IS ORDERED that defendant's motion to submit untimely affidavits in support of his motion is DENIED.

Entered this 29th day of December, 2004.

BY THE COURT:

s/ BARBARA B. CRABB
BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

04-C-527-C
01-CR-0071-C-02

UNITED STATES OF AMERICA,

Plaintiff,

v.

STACEY MILLER,

Defendant.

[Entered Mar. 8, 2005]
[Filed Mar. 9, 2005]

ORDER

The order entered in this case on December 29, 2004, is amended in the following respect: At the beginning of the last paragraph on page 14, the number 30 is deleted and the number 31 is inserted therefor.

In all other respects, the order remains as entered on December 29, 2004.

Entered this 8th day of March, 2005.

BY THE COURT:

s/ BARBARA B. CRABB
BARBARA B. CRABB
District Judge

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

August 8, 2006

No. 05-1616

STACEY MILLER,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Wisconsin
No. 04 C 527
Barbara B. Crabb, *Chief Judge*

[Filed Aug. 8, 2006]

Before: BAUER, POSNER, and RIPPLE, Circuit Judges.

ORDER

On consideration of the petition for rehearing or rehearing *en banc* filed in the above-captioned case by petitioner-appellant on July 17, 2006, all of the judges on the original panel have voted to DENY the petition for rehearing and no judge in active service has requested a vote on the petition for rehearing *en banc*.[1] Accordingly, the petition for rehearing or rehearing *en banc* is DENIED.

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[1] Chief Judge Joel M. Flaum and Judge Ilana Diamond Rovner took no part in the consideration of this case.